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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

JEFFREY HUNTINGTON,

Plaintiff,

vs.

SMOKE CITY FOR LESS LLC d/b/a
SMOKE CITY FOR LESS; VAPOR
BEAST LLC; AND DOES 2-50

Defendants.

Case No.: 4:22-cv-05014-MKD

Assigned to Hon. Mary K. Dimke

**PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:
DECEMBER 2, 2024
WITHOUT ORAL ARGUMENT**

Without Oral Argument Plaintiff Jeffrey Huntington, by and through his counsel of record, hereby moves this Court for an order granting summary adjudication pursuant to Federal Rules of Civil Procedure, Rules 56(a),(g), on the

grounds that there is no triable issue as to fact regarding Plaintiff's claim of a design defect. This Motion is based on three issues: (1) the manufacturer of the underlying product that injured Plaintiff is LG Chem LTD, (2) Smoke City for Less LLC and Vapor Beast LLC ("Defendants") are manufacturers for purposes of strict products liability pursuant to Washington Law (RCW 7.72.030 and 7.72.040), and (3) the 18650 lithium-ion cell that injured Plaintiff was not designed to be used outside of a battery pack as a removable power source.

I. Facts

On May 10, 2016, the FDA officially started regulating e-cigarette devices and batteries.¹ Plaintiff's Separate Statement in Support of Motion for Partial Summary Judgment ("SS") 1. On March 9, 2017, Underwriters Laboratories (UL) published the first recognized safety standard for e-cigarette design: UL 8139.² SS 2. UL is accredited by the American National Standards Institute and the Standards Council of Canada as a Standards Development Organization. SS 13. UL 8139 requires e-cigarette devices to possess a built-in battery design. SS 2-4. UL 8139 also requires cells to have protective circuitry to prevent overcharge and discharge resulting from "anticipated normal and abnormal use and conditions including

¹ A battery is a group of cells put together to create a single power source. A cell is a single power-producing device that is often placed into a pack of other cells to create a battery. For example, multiple 18650 lithium-ion cells may be placed into a pack to form the battery that charges a cordless power tool. The term "battery" is often used interchangeably to mean "battery" or "cell."

² The safety standards created by Underwriters Laboratories use the same acronym as the Standards Development Organization that created the safety standards: UL.

1 component faults in any control system, short circuit conditions and power
2 surges.” S 2-4.

3 On July 2017, the U.S. Fire Administration (USFA) published a second
4 report on Electronic Cigarette Fires and Explosions. Dalia Dec. SS 5. The USFA
5 report documented approximately 195 reported cases of electronic cigarette fires
6 and explosions between 2009 and December 31, 2016, but most cases are not
7 reported. SS 7-8. The USFA described the cells as behaving like “flaming rockets”
8 when the cell fails. SS 9. The USFA found that e-cigarette devices should have the
9 UL stamp of approval. SS 10-11. The USFA also concluded that lithium-ion
10 batteries should not be used in e-cigarette devices. SS 6, 12.

11 On April 27, 2018, UL released UL 8139 1st edition which establishes the
12 safety standards for electronic cigarettes’ and vaping devices’ electrical systems.
13 SS 14-15. UL 8139 prohibited the direct replacement of cells in a battery
14 compartment for e-cigarette devices. SS 16. An agent of the FDA approved UL
15 8139. SS 17-18. On September 19, 2018, the Portable Rechargeable Battery
16 Association (PRBA) published its Safety Policy on Use and Handling of Stand-
17 Alone Cylindrical Lithium-Ion Cells. Dalia Dec. SS 19. The publication stated that
18 stand-alone and removable lithium ion cells not marketed as “single cell lithium
19 ion batteries” should not be handled by consumers; LG Chem is a member of the
20 PRBA along with the rest of the world’s biggest battery manufacturers. SS 19-21.

1 The FDA has never approved a device that uses removable 18650 lithium-ion cells
2 as a power source. SS 22.

3 LG Chem has repeatedly stated that its cells are industrial component parts
4 that are not intended to be used outside of a battery pack by individual consumers.
5 SS 23. The LG Chem cells are supposed to be packed together into battery packs
6 containing safety mechanisms that will protect consumers. See Id.

7 Plaintiff was injured by the explosion of an 18650³ lithium-ion battery he
8 purchased from Smoke City for Less LLC. SS 24-28. The injury took place on
9 November 7, 2019. Id. Smoke City for Less LLC's owner has stated under oath
10 that Vapor Beast LLC is the only entity Smoke City for Less LLC purchased
11 lithium-ion batteries from before Plaintiff was injured. SS 29. Smoke City for Less
12 LLC, via written discovery, also stated that it purchased its batteries from Vapor
13 Beast LLC. SS 30. Plaintiff originally attempted to sue LG Chem Ltd., the battery
14 manufacturer, but the Court denied personal jurisdiction over the manufacturer.
15 ECF No. 29.

16 **II. Legal Authority**

17 The "party seeking summary judgment always bears the initial
18 responsibility of informing the district court of the basis for its motion, and
19 identifying those portions" of the record which demonstrate "the absence of a

20 _____
³ 18650 denotes the measurements of the cell. It means that the cell is 18mm by 65mm and the "0" means the cell is cylindrically shaped.

1 genuine issue of material fact.” *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 323.

2 The burden then shifts to the nonmoving party who “must set forth specific facts
3 showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*,
4 477 U.S. 242, 250 (1986) (quoting Fed.R.Civ.P. 56). “The evidence of the
5 nonmovant is to be believed, and all justifiable inferences are to be drawn in his
6 favor.” *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59, 90
7 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). A genuine issue of material fact exists if the
8 evidence is such that a reasonable jury could return a verdict for the nonmoving
9 party. *Liberty Lobby, Inc.*, at 248; see also *Matsushita Elec. Indus. Co., Ltd. v.*
10 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (the requirement that a dispute be
11 “genuine” means that there must be more than “some metaphysical doubt as to the
12 material facts”). Consequently, the central issue is “whether the evidence presents
13 a sufficient disagreement to require submission to a jury or whether it is so one-
14 sided that one party must prevail as a matter of law.” *Liberty Lobby, Inc.*, 477 U.S.
15 at 251–52.

16 //

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1 **III. Argument**

2 **A. Lithium-ion cells should never be used as individual removable power**
3 **sources according to the federal government, the battery trade association and,**
4 **basic scientific standards.**

5 Multiple government agencies have agreed that 18650 lithium-ion cells are
6 not supposed to be used in connection with these e-cigarette devices. The USFA
7 conducted studies showing the gravity of these injuries and expressly stated that
8 these sources of power are not safe for e-cigarette devices. SS 5-12. An accredited
9 Standards Development Organization (UL), with support from the FDA, established
10 the basic industry standards for e-cigarette devices and their power sources. SS 1-4,
11 13-18; The most relevant safety requirement here is that the battery compartment is
12 prohibited from allowing direct replacement of cells. SS 16. The trade association
13 for portable rechargeable batteries, encompassing the world's biggest battery
14 manufacturers, also agrees that these cells should not be used with e-cigarette
15 devices. SS 19-21. To date, the FDA has never approved an e-cigarette device that
16 utilizes individual 18650 lithium-ion cells as a power source. SS 22. Plaintiff's
17 November 2019 injury from an 18650 lithium-ion cell was entirely preventable
18 because multiple government agencies, the relevant trade association, and the
19 organization tasked with establishing safety standards for this industry all agreed no
20

1 later than September 2018: 18650 lithium-ion cells should not be used outside of a
2 battery back by individual consumers. SS 1-22.

3 **B. LG Chem Ltd. manufactured the cell that injured Plaintiff.**

4 Plaintiff and Vapor Beast LLC's experts have both agreed that the cell is a
5 model manufactured by LG Chem. SS 31-37. The subject cell has features unique
6 to an LG Chem cell: an anode tab measuring approximately 34mm long with a 3-
7 by-24 grid pattern on the side, a 4-hole top cap, and a 4-by-10 embossment pattern.
8 SS 31-36. Vapor Beast's own expert agrees that the cell that injured Plaintiff was
9 manufactured by LG Chem. ["The CT scan of the subject battery cell revealed
10 characteristics that would indicate this battery cell was manufactured by LG with a
11 current rating of 10A."; "S-E-A agrees that the subject cell has manufacturing
12 characteristics to indicate it was manufactured by LG with a 10A rating." SS 37
13 Exhibit N. As such, there is no genuine dispute as to who manufactured the
14 injurious cell (i.e. LG Chem).

15 **C. Plaintiff is unable to hold a judgment against the manufacturer**
16 **thereby making the product sellers strictly liable.**

17 Under Washington state law, Defendants are considered "product sellers."
18 RCW 7.72.010(1). A "product seller" is treated as a manufacturer for strict liability
19 purposes when no solvent manufacturer is subject to service of process in Plaintiff's
20 domicile or the state of Washington or the Court determines that it is highly probable

1 that the claimant would be unable to enforce a judgment against any manufacturer.
2 RCW 7.72.040(2)(a),(b).

3 Plaintiff attempted to sue LG Chem for Plaintiff's injury. Unfortunately, the
4 Court ruled that LG Chem is not subject to personal jurisdiction. ECF No. 29. The
5 Court ruled that Plaintiff cannot hold LG Chem in this Court, let alone obtain a
6 judgment against LG Chem in this Court. Therefore, it is beyond "highly probable"
7 that Plaintiff would be unable to enforce a judgment against the manufacture. RCW
8 7.72.040(2)(a),(b). As such, the "product sellers" (retailer and distributor), are to be
9 treated as manufacturers for strict liability purposes. Id.

10 **D. Defendants are strictly liable as manufacturers because the products are**
11 **not designed to be used by individual consumers outside of a battery pack.**

12 A manufacturer is strictly liable when the product is "not reasonably safe in
13 construction." RCW 7.72.030(2). A product is "not reasonably safe in construction"
14 when "the product deviated in some material way from the design specifications."
15 RCW 7.72.010(2)(a).

16 Strict liability is the applicable standard for a failure to warn or design defect
17 claim maintained under Washington's Product Liability Act (WPLA). *Kirkland v.*
18 *Emhart Glass S.A.*, W.D.Wash.2011, 805 F.Supp.2d 1072. Washington utilizes a
19 "buyer oriented approach" in that the focus is on the buyer's expectation, not the
20 actions of the seller or manufacturer. *Lenhardt v. Ford Motor Co.* (1984) 102

1 Wash.2d 208, 683 P.2d 1097. Several policy reasons justify imposing strict
2 products liability on product sellers: (1) Product sellers are in a better position to
3 exert pressure on manufacturers to increase the safety of the product; (2) Consumers
4 look to the seller for advice on selecting, operating, and maintaining the product;
5 (3) Product sellers are in a better position than consumers to absorb the cost of
6 injury because the product seller can spread the costs of injury among the entire
7 consuming public. *Buttelo v. S.A. Woods-Yates American Mach. Co., Inc.* (1993)
8 72 Wash.App. 397, 864 P.2d 948.

9 Despite UL 8139 expressly prohibiting the direct replacement of cells in
10 vaping devices in 2018 (more than a year before Plaintiff's injury) and this ongoing
11 lawsuit, Smoke City for Less continues to sell 18650 lithium-ion cells for use
12 outside of a battery pack. SS 14, 39-41. Smoke City for Less LLC removed the cells
13 from their original packaging, placed the cells in a glass display case in the store,
14 and then sold the cells to customers with an optional plastic case depicting the retail
15 store's name. SS 43-45. Previously, the retailer did not even provide a plastic safety
16 case for carrying the cells. SS 46.

17 During this litigation, the retailer has been selling cells that reinforce the fact
18 that these cells are not designed for use outside of a battery pack; A cell produced
19 by the retailer during litigation says "DANGER DO NOT USE OUTSIDE OF
20 DATTERY [sic] PACK." SS 41. The retailer even confirmed that the retailer

1 continued to sell these cells in direct contradiction to the warning displayed on the
2 cell. SS. 41.



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8 Q. So would you say that you believe this battery that you put on the display
9 shelf after taking a picture of it was safe for sale?

10 A. Yeah;

11 Q. Do you believe that this battery is safe to be removed from the vape
12 device, charged, and subsequently placed back into the device?...

13 A. Which battery? The one in the picture?

14
15 Q Yes, the one in this picture.

16 A. Yeah. SS 41.

17 Vapor Beast was, at the very least, selling battery cases in 2019 to Smoke
18 City for Less LLC. SS 47. Furthermore, Smoke City for Less LLC has repeatedly
19 stated that it purchased its batteries from Vapor Beast LLC. SS 29-30. It serves the
20 retailer's own interests to identify the battery distributor because the distributor

1 would alleviate the burden of liability.

2 LG Chem has repeatedly stated that its cells are not designed to be used
3 outside of battery packs by individual consumers. SS 23. As such, the retailer and
4 distributor has been selling cells that have “deviated from the design specification”
5 by selling them outside of battery packs. RCW 7.72.030(2) and RCW
6 7.72.010(2)(a).

7 **IV. Conclusion**

8 Plaintiff requests that the Court grant Plaintiff’s Motion for Partial Summary
9 Judgment as a matter of law regarding Plaintiff’s design defect claim. Alternatively,
10 Plaintiff requests that the Court resolve three issues: (1) the cell that injured Plaintiff
11 was manufactured by LG Chem; (2) retailers, wholesale retailers, and distributors
12 are to be treated as manufacturers for purposes Washington strict products liability
13 because the manufacturer is not subject to personal jurisdiction; and (3) scientific
14 and industry standards prohibited the use of individual 18650 lithium-ion cells as a
15 removable power source without a protective battery pack before Plaintiff was
16 injured.

17
18 Dated: October 11, 2024.

Respectfully submitted,

19 CORRIE YACKULIC LAW FIRM, PLLC

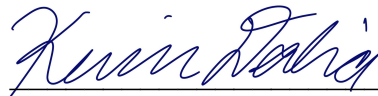
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CERTIFICATE OF SERVICE

I certify that I have this day electronically filed the within and foregoing *PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT* with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

This 11th day of October 2024.

/s/ Kevin S. Dalia

Kevin S. Dalia